

Wearables: Outlining the legal concerns for employers

A look at the Dutch data protection authority's recent actions

On 8 March 2016, the Dutch data protection authority ('DPA') announced that following investigation, two companies had stopped the processing health data of their employees through wearables. The companies had provided their employees with fitness bracelets which measured the movements of these employees. One company even had insight into the sleep and waking patterns of its employees. The DPA stressed that such personal data of employees may not be processed by an employer, not even when the employee has given its consent.

Wearable data

Personal data processed through wearables are to be considered health data, and thus data of a sensitive nature for which processing a strict legal regime applies.

In principle, employers are not allowed to process health data of their employees, unless a legal exemption applies. For example, when an employee calls in sick, an employer may not register the nature of the illness. This was, in fact, the subject of another recent investigation of the DPA on Stichting Ambrona, which was published in March 2016. Such health data may also not be processed with the consent of the employee.

This is in line with the view the EU data protection authorities, united in the Article 29 Working Party, emphasising that consent may not be a valid ground for the processing of personal data in an employment relationship, given the element of subordination in such relationship.

The DPA therefore concluded in this case, that an employer may give away wearables as a present, yet it may not set terms for the use of such wearables. It should be the free choice of the employee whether he or she wishes to share their health data with the manufacturer of the wearable, friends or colleagues. This does not, however, include the employees' HR manager or other persons working on behalf of the employer.

DPA agenda

As the full report of the DPA has not yet been released, it is not yet certain what exactly has instigated this examination. It may well be that that DPA started its examination based upon a complaint of an individual, but it could also be that it was on its own initiative. In this respect, it is good to know that the investigation fits very well within its Supervision Agenda that was announced at the beginning of this year. In the agenda, the DPA stated that, during 2016, it will focus on both health data and the processing within the employment context. The DPA

has also expressed that wearables as part of profiling through the Internet of Things has its specific attention. It is not the first time that the DPA has investigated the processing of data in the context of eHealth. In November 2015, the DPA published its conclusions in its investigation on the Nike+ Running app. Since the market for such devices is rapidly developing, the focus on the privacy impact is likely to increase.

Conclusion

Given the sensitive nature of the personal data concerned, it is to be expected that the DPA will keep paying attention to the security of health data and this also in combination with the newly introduced notification duties regarding serious data breaches. Several data breaches relating to health data have been reported recently. In order to have the attention at board level of hospitals, a letter was sent by the DPA to the management of Dutch hospitals on this issue. Given the newly introduced data breach notification duty, it is to be expected that the DPA will keep paying attention to data processing activities. All in all, processing of health data should be done with due care and sound legal advice.

The decision should, however, not stop providers of wearables marketing their devices, but they should not target their actions to employers for investigating the wellbeing or health conditions of their employees, but to individual users. Of course, privacy requirements should be taken into account.

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